Supreme Court, U.S.
FILED

No. 95-1357

JAN 23 1996
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1995

LEROY JONES and PAULA FAY JONES,

Petitioners,

V.

ALFRED GARCIA and ROSE A. GARCIA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 23, 1996

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QUESTIONS PRESENTED

1. Whether acts taken in violation of the Automatic Stay in bankruptcy of 11 U.S.C. § 362(a) are void ab initio or simply voidable?

2. Whether the foreclosure sale in issue had to satisfy the terms of 11 U.S.C. § 549(c) even assuming it was not avoided for violating the automatic stay?

PARTIES TO THE PROCEEDINGS

Petitioners Leroy and Paula Faye Jones are Chapter 13 Debtors in bankruptcy. Respondents Alfred and Rose A. Garcia are mortgagees who hold a mortgage on the Petitioners' residence.

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2. This case also presents an important issue regarding the relationship between the automatic stay in bankruptcy and an exception to the trustee's avoiding powers under 11 U.S.C. § 549(c) which, absent review by this Court, will leave unresolved a conflict between at least two circuits 22

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F. Kennedy, "Automatic Stays under the New Bankruptcy Law," 12 U. Mich. J. L. Ref. 1 (1978) 17

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In The
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LEROY JONES and PAULA FAY JONES,
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Petition for Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Petitioners Leroy Jones and Paula Fay Jones hereby petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The bankruptcy court's order (Appendix ["App."] G; A-29), dated September 28, 1994 and reported at 172 B.R. 535 (E.D. Tex. 1995)(App. D; A-11), granted relief from the automatic stay to Respondents so as to enable them to proceed with a forcible entry and detainer action against the Debtors. On February 2, 1995, the district court affirmed the bankruptcy court order (App. C; A-9). In an opinion dated September 11, 1995 and reported at 63 F.3d 411 (5th Cir. 1995), the Circuit Court of Appeals for the Fifth Circuit affirmed the district court judgment (App. B; A-3). On October 25, 1995 the circuit court denied Petitioners' petition for a rehearing (App. A; A-1).

JURISDICTION

On appeal from the United States District Court for the Eastern District of Texas, the United States Court of Appeals issued its opinion denying Petitioners' appeal on September 11, 1995 (App. B; A-3), and denied their timely petition for rehearing on October 25, 1995 (App. A; A-1). This petition is, accordingly, filed within the time allowed by law. Supreme Court Rule 13.1, 13.4. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 11 U.S.C. § 362 provides in pertinent part that:

> (a) Except as provided in subsection (b) of this section, a petition filed under 301, 302, or 303 or this title . . . operates as a stay, applicable to all entities, of . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate . . .
>
> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
>
> (1) for cause . . .

Title 11 U.S.C. § 549 (c) provides that:

> The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the commencement

> of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser. . .

STATEMENT OF THE CASE

The Petitioners purchased their home from Respondents in March 1989. They executed a promissory note payable to Respondents in the amount of $27,000.00 as consideration for the transaction. Respondents in turn secured the debt with a mortgage and lien on the property. This security interest was perfected by a deed of trust which was filed of record in the Jefferson County, Texas Real Property Records.

Petitioners defaulted on the note in 1991, whereupon Respondents began foreclosure proceedings. Petitioners filed for relief under Chapter 13 of the Bankruptcy Code on June 20, 1991. Upon the administration of this case, No. 91-10690, a plan was confirmed under which Petitioners were to pay Respondents' claim outside of the plan. In March 1994, however, Petitioners again defaulted on their payments, whereupon Respondents once more instituted foreclosure proceedings. Petitioners filed a motion to dismiss their bankruptcy case on May 5, 1994; the motion was duly served upon Respondents. Respondents then accelerated the note on May 16, 1994.

Petitioners thereupon filed the present Chapter 13 bankruptcy case, No. 94-10423, on May 23, 1994. Respondents apparently did not, however, receive notice of this bankruptcy filing because the notice was sent to

an incorrect address. In addition, the petition was never made of record in the Jefferson County Real Property Records. Respondents held a trustee's sale on June 7, 1994. They purchased the property at their own sale for $28,000.00, the amount of the debt. The trustee's deed they received as a result of their sale was then properly recorded.

Respondents received actual notice some time after the trustee's sale that Petitioners had filed a new Chapter 13 case before the foreclosure sale had taken place. In response to this news, Respondents filed a Motion to Lift Stay in the bankruptcy court so as to permit them to proceed with a forcible entry and detainer action against the Petitioners, who continued (and still continue in fact) to occupy the premises.

The bankruptcy court found that the foreclosure sale unquestionably violated the automatic stay of 11 U.S.C. Section 362(a). At the same time, the bankruptcy court found that the fact of this violation rendered the sale voidable but not void, under governing fifth circuit precedent. The court then looked to Section 549(c) to see if the foreclosure could be set aside by the Debtors upon the strength of their argument that foreclosure sales are not within the contemplation of Section 549(c). Based upon its reading of the authority, the bankruptcy court concluded that the foreclosure sale was protected by that statutory provision.

In light of its protected status under Section 549(c), the bankruptcy court found that Respondents held good title to the property. It followed, in the court's view, that because title to the property was in Respondents, the Petitioners could neither have an equity interest in the property nor could it be necessary to their reorganization. Accordingly, the bankruptcy court modified the stay to permit Respondents to evict Petitioners from the residence in question.

The District Court for the Eastern District of Texas then upheld the bankruptcy court order in

summary fashion, whereupon Petitioners took an appeal of that judgment to the Fifth Circuit Court of Appeals. The circuit court also found for Respondents and upheld the district court judgment. The basis of the court's decision was the so-called voidable doctrine followed by the bankruptcy court--at least in part. It reiterated the view that violations of the automatic stay are voidable but not void ab initio. The court recast that doctrine somewhat, however, by suggesting that it is not necessarily the actual post-petition acts committed in violation of the stay that are voidable; rather, it is "the effect of the stay itself which is voidable, subject to the broad discretion afforded a bankruptcy judge under section 362" (App. B; A-7). In light of that formulation, the court found that the bankruptcy court had "merely exercised its discretion to modify the stay, as section 362(d)(3) [1]authorizes, thereby validating the foreclosure and transfer of title to the [Respondents]" (A-7).

The circuit court dealt with the Section 549(c) foundation of the bankruptcy court opinion by concluding that Section 549(c) had nothing whatever to do with the case at all. That is, because the bankruptcy court had, in the circuit court's view, validated the foreclosure and transfer of title under Section 362(d), those acts were placed by that court under the protection of Section 549(a) and "[t]he section 549(c) exemption is therefore not implicated in this case" (A-8.

In the wake of the fifth circuit opinion, Petitioners seek the grant of a Writ of Certiorari on the ground that two important issues of bankruptcy law are

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[1]The courts' reference to Section 362(d)(3) is in error. That subsection was added by the Bankruptcy Reform Act of 1994, Pub.L.No. 103-394, 108 Stat. 4106 and only governs cases filed after its effective date of October 22, 1994. 108 Stat. at 4150. This case, which was filed on May 23, 1994, is therefore ruled by Section 362(d)(2).

implicated in this case. These two issues, which involve a resolution of the longstanding void ab initio/voidable debate among the circuits and an examination of the conflict between the fifth and ninth circuits over the relationship between Sections 362(d)(2) and 549(c), fully justify granting Certiorari in this case.

REASONS FOR GRANTING THE PETITION

1. **This case presents a significant and widely debated issue regarding whether acts taken in violation of the automatic stay in bankruptcy are void ab initio or merely voidable, which, absent review by this Court, will leave unresolved a longstanding conflict among the circuits over this issue.** The question of whether acts undertaken in violation of the automatic stay are void ab initio or merely voidable is an issue that has been considered very widely in the bankruptcy, district, and circuit courts. With the exception of two circuits, the federal and the fifth circuits, the result of this consideration has been uniform: Such acts are void ab initio. But because the judicial resolution of this issue is not entirely uniform, because the federal circuit recently joined the fifth circuit in expanding that lack of uniformity in Bronson v. United States, 46 F.3d 1573, 1578 (Fed. Cir. 1995), because not all circuits have considered the issue, and because Petitioners are aggrieved by the fifth circuit's espousal of what they believe is a misreading of 11 U.S.C. § 362(a), review by this Court by way of Writ of Certiorari is important to the uniform application of the federal bankruptcy law in all circuits. See generally, J. Van Patten, "The Forgotten Constraint: Bankruptcy Legislation and the Uniformity Clause,: 1 J. Bankr. L.& P. 533, 540-42 (1992).

In functional terms, the automatic "stay is 'automatic' because it is triggered upon the filing of a

bankruptcy petition regardless of whether the other parties to the stayed proceedings are aware that a petition has been filed." Constitution Bank v. Tubbs, 68 F.3d 685, 691 (3d Cir. 1995). Given the "automatic" character of this stay, one might assume that any acts committed in violation of the automatic stay would, by parity of logic, be "automatically" null and void as well, so as to further the "automatic" nature of the stay. As applied to the present case, there is no question that the automatic stay was in force when the foreclosure sale and transfer of title took place. One might therefore expect that those proceedings and acts would automatically have become nullities as a result.

In fact, the great preponderance of authority in general, and a majority of the circuit courts of appeals in particular, endorse just such a view of the matter. A very recent expression of this school of thought declared flatly that "any act taken in violation of the automatic stay is void,." Parker v. Bain, 68 F.3d 1131, 1138 (9th Cir. 1995).

As Petitioners have already noted, this view is not unanimous, which is precisely why they ask the Court to resolve this matter so as to insure uniformity in future adjudications of the issue below. The Federal Circuit Court of Appeals, for example, recently concluded that "violations of the stay are voidable, and not void." Bronson v. United States, supra, 46 F.3d at 1578. Even more to the point, the fifth circuit, the court to which a Writ of Certiorari in this case would be directed, is "persuaded that the better reasoned rule characterizes acts taken in violation of the automatic stay as voidable rather than void." Sikes v. Global Marine, Inc., 881 F.2d 176, 178 (5th Cir. 1989). Accord, Picco v. Global Marine Drilling Co., 900 F.2d 846, 850 (5th Cir. 1990).

Although a split among the circuits does exist, and notwithstanding that not all circuits have spoken to

the issue, most circuits have in fact taken a clear position on the matter. The case law that has resulted from this process demonstrates that by far the clear majority of circuits opt for the void ab initio point of view. Among the circuits so holding are the first, In re Smith Corset Shops, 696 F.2d 971, 976 (1st Cir. 1982), citing Kalb v. Fuerstein, 308 U.S. 433 (1940); second, Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 527 (2nd Cir. 1994); third, Constitution Bank v. Tubbs, supra, 68 F.3d at 692 n.6 ; sixth, Easley v. Pettibone Michigan Corp., 990 F.2d 905, 909 (6th Cir. 1993); ninth, Parker v. Bain, supra, 68 F.3d at 1138 ; tenth, Franklin Savings Association v. Office of Thrift Supervision, 31 F.3d 1020, 1022 (10th Cir. 1994), citing Kalb v. Fuerstein, supra; and eleventh circuits. Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308 (11th Cir. 1982), citing Kalb v. Fuerstein, supra.

Indeed, the relative isolation of the fifth circuit on this issue is illustrated by the fact that the great majority of Texas state cases firmly opt for the void ab initio point of view notwithstanding the state's geographic presence within the fifth circuit.[2] See, e.g., Howell v. Thompson, 839 S.W.2d 92, 92 (Tex. 1992); Thomas v. Miller, 906 S.W.2d 260, 261 (Tex.App. -- Texarkana 1995), rejecting the fifth circuit authority on the subject.

Three other federal circuits have simply not yet

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[2] State courts naturally follow the rule that "United States Bankruptcy Court rulings upon bankruptcy issues are controlling upon state court issues pursuant to the Supremacy Clause." Shewmaker v. Etter, 644 N.E.2d 922, 927 (Ind. Ct. App. 1994). It is not clear, however, that state courts are bound to follow the decisions of the federal circuits in which they are located in the same sense in which bankruptcy and federal district courts are so bound. In any case, it is telling that Texas state courts have by and large rejected the fifth circuit view on this matter.

confronted the question in any reported decision. The fourth circuit, for example, seems not to have addressed the void ab initio/voidable issue, although courts within that circuit have favored the voidness school of jurisprudence. See, e.g., In re Clarkson, 168 B.R. 93, 94 (Bankr. D.S.C. 1994); In re Lampkin, 116 B.R. 450, 452, 454 (Bankr. D. Md. 1990); In re Burns, 112 B.R. 763, 765 (Bankr. E.D. Va. 1990); In re Estate of Barefoot, 43 B.R. 608, 609 (Bankr. E.D.N.C. 1984); In re Stacy, 21 B.R. 49, 53 (Bankr. W.D. Va. 1982).

Likewise, the eighth circuit appears yet to speak to the issue, although the courts within that circuit (with a few exceptions) favor the void ab initio view. See Olson v. United States, 133 B.R. 1016, 1019 (D. Neb. 1991); In re Rose, 113 B.R. 534, 537 (W.D. Mo. 1990); In re Rhodes, 147 B.R. 492, 494 (Bankr. W.D. Ark. 1992), aff'd, 155 B.R. 491 (W.D. Ark. 1993); In re National Cattle Congress, Inc., 179 B.R. 588, 599 (Bankr. N.D. Iowa 1995) ; In re Claussen, 118 B.R. 1009, 1014 (Bankr. D.S.D. 1990).

In addition, the D.C. circuit seems not to have addressed the issue; neither has the local district court. Nonetheless, the bankruptcy court within that circuit adhered to the void ab initio point of view in In re Rothenberg, 173 B.R. 4, 14 (Bankr. D.D.C. 1994), citing Kalb v. Fuerstein, supra.

Finally, the seventh circuit has reserved a decision on the issue. York Center Park District v. Krilich, 40 F.3d 205, 207 (7th Cir. 1994). At the same time, however, numerous courts within the seventh circuit have opted for the void ab initio instead of the voidable camp. See, e.g. , Matter of Garofalo's Finer Goods, Inc., 186 B.R. 414, 436 (N.D. Ill. 1995); In re Omni Graphics, Inc., 119 B.R. 641, 644 (Bankr. E.D. Wis. 1990); Matter of Holland, 21 B.R. 681, 688 (Bankr. N.D. Ind. 1982).

Although this overwhelming weight of authority should be highly persuasive, the demonstrated preference for the void ab initio analysis among nearly all courts, federal and state, may not be sufficient alone to entail the granting of this Petition or a disapproval by this Court of the judgment below. But a consideration of this Courts' views under prior bankruptcy enactments, along with an analysis of the reasons why the void ab initio rule better effectuates the goals of the present Bankruptcy Code, combine to recommend the wisdom of disapproving the voidable rule adopted by the fifth and federal circuits.

Even though this Court has never addressed this issue under section 362(a) of the present Code, decisions of the Court under the Bankruptcy Act of 1898 suggest the propriety of just such a result in this case. The Court announced when the Act was in its infancy that a petition filed in bankruptcy is "a caveat to all the world, and in effect an attachment and injunction." Mueller v. Nugent, 184 U.S. 1, 14 (1901). Over the life of the Act, "the Supreme Court gradually modified the former Rules of Bankruptcy Procedure to create an injunction similar to the automatic stay." Note, "The Inequitable Machinations of Section 362(a)(3): Rethinking Bankruptcy's Automatic Stay over Intangible Property Rights," 66 S.Cal. L. Rev. 659, 666 (1992).

This course of action was in furtherance of the principle, expressed in Isaacs v. Hobbs Tie & Timber Co., 282 U.S. 734, 737-38 (1932), that

> the court's possession cannot be affected by actions brought in other courts . . . Thus, while valid liens existing at the time of the commencement of a bankruptcy proceeding are preserved, it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their

> liquidation . . . The exercise of this function necessarily forbids interference with it by foreclosure actions in other courts . . .

In one estimation, "it is probable that a literal extension of the Issacs decision would have the effect, at least, of invalidating the judicial foreclosure of a valid lien, begun after the filing of the petition without the consent of the bankruptcy court, even in the absence of a request for a restraining order." 1 J. Moore & L. King, Collier on Bankruptcy ¶ 2.62 at 335 (14th ed. 1968).

An automatic stay of sorts was ultimately fashioned out of a number of bankruptcy rules and then applied under the Act. Rule of Bankruptcy Procedure 401(a), for example, provided in language not unlike that of present Section 362(a) that "[t]he filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt, or the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt other than one not dischargeable under clause (1), (5), or (7) of § 17a of the Act."

Even more pertinent to the present dispute, Rule of Bankruptcy Procedure 601(a) provided that "[t]he filing of a petition shall operate as a stay of any act or the commencement or continuation of any court proceeding to enforce (1) a lien against property in the custody of the bankruptcy court, or (2) a lien against the property of the bankrupt obtained within 4 months before bankruptcy by attachment, levy, or other legal or equitable process or proceeding." The Advisory Committee's Note to Rule 601 suggested that "[w]hether the enforcement of a lien against property in the bankruptcy court's custody by an act or proceeding after bankruptcy without permission of the bankruptcy court is void has been the subject of conflicting views by the courts and commentators . . . This rule consists with the

view that such an act or proceeding is void." In its commentary on the Rule Collier notes that "Rule 601 was intended to resolve any doubt about the effect of lien enforcement without prior court approval as to property over which the bankruptcy court has summary jurisdiction . . . Thus, where a state court has not acquired jurisdiction over the property in question, Rule 601(a) has the effect of making all post-petition acts of lien enforcement--including the foreclosure sale--null and void." 13 J. Moore & L. King, Collier on Bankruptcy ¶ 601.06 at 6-18 (14th ed. 1975). The result is that on balance the automatic stay under the Act--at least with respect to its application to facts like those before the Court in this case--entailed that the foreclosure sale in issue here would have been a nullity under the Act.

The view that acts in violation of the automatic stay have always been void ab initio rather voidable without regard to the particular legislative expression of the bankruptcy power gains support from the Court's decision in Kalb v. Fuerstein, supra. The decision arose under the Frazier-Lemke Act, codified as Bankruptcy Act § 75. The Act forbade, in pertinent part, "at any time after the filing of the petition under this section . . . (2) Proceedings for foreclosure of a mortgage on land[.]" 11 U.S.C. § 203(o)(2)(1940)(repealed).

In Kalb the farmer and his wife owned property in Walworth, Wisconsin. On March 7, 1933 the mortgagees began foreclosure proceedings in the Walworth County court. A judgment of foreclosure was entered on April 21, 1933. Kalb filed a petition under the Frazier-Lemke amendment to the Act on October 2, 1934, and the county sheriff sold the property under the foreclosure judgment on September 16, 1935, a date on which Kalb's bankruptcy proceeding was still undergoing administration. The question before the Court was whether the foreclosure sale was of any effect

in light of the statute.

The Court declared the confirmation of the sale to be a nullity. It held that

> the federal act of itself . . . operated . . . to oust the jurisdiction of the court so as to stay its power to proceed with foreclosure, to confirm a sale, and to issue an order ejecting appellants from their farm . . . the action of the Walworth County Court was not merely erroneous but was beyond its power, void, and subject to collateral attack . . . a preemptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no state court have jurisdiction over a petitioner farmer- debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power, and nullities subject to collateral attack. . . the ejection of appellants from their property . . . were all without authority of law.

308 U.S. at 438-39, 443 (emphasis supplied). As a result of this decision, it was subsequently concluded that "[t]he stay provided for in § 75 is an automatic statutory stay, and although no judicial stay is obtained, state court proceedings in a foreclosure action taken subsequent to the filing of a § 75 petition are null and void and subject to collateral attack." 2 J. Moore & L. King, Collier on Bankruptcy ¶ 21.29 at 365 (14th ed. 1974).[3]

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[3] In its broadest sense, the automatic stay under the 1898 enactment has been said to be "derived from §§ 11a, 14f(2), 17c(4), 77j, 83(c), 113, 116(4), 148, 314, 414, 428, and 614 of the Act. Cf. Proposed Rules 401, 601, 10-601, 11-44 and 13-401." Report of the Commission on the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137, 93d Cong., 1st Sess., Pts. I and II (1973) Bankruptcy Act of 1973 ("Commission Report"), § 4-501, Note 1. As a result, the

(continued...)

The Kalb decision, when considered in conjunction with the other automatic stays promulgated under the Act, mandated automatic stays which, when violated, rendered the acts committed in violation of their terms nullities, especially when the offending act was a foreclosure of the bankrupt's property. Particularly when the automatic stay became a more prominent part of bankruptcy jurisprudence as the rules structuring the stay under the Act were later promulgated, bankruptcy courts applying the various automatic stays under the Act adopted the very void ab initio principle under that enactment that Petitioners urge upon the Court in this proceeding. See, e.g., In re Sarno, 23 C.B.C. 151, 155 (Bankr. E.D.N.Y. 1980) ("Judgments and judgment liens obtained in violation of the automatic stay provisions of the Bankruptcy Rules . . . are null and void;" Chapter XI-Rule 11-44 case); In re Seafarer Fiberglass Yachts, Inc., 1 B.R. 358, 364 (Bankr. E.D.N.Y. 1979)(Chapter XI-Rule 11-44 case).

It is therefore plain that the similarity of the automatic stays under the Act to that of the Code has led many courts to conclude that this Court had, even before the enactment of Section 362(a), considered acts taken in violation of the automatic stay to be void ab initio. Indeed, the void ab initio principle has arguably been a governing staple of bankruptcy law for nearly a century at least. Petitioners therefore urge the Court to find that Section 362(a) is governed by this long-standing doctrine, and that their Petition be granted so as ultimately to impart uniformity in light of this fact to bankruptcy court administration of the automatic stay.

Such a result is faithful to both historical continuity and accepted rules of statutory construction.

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[3](...continued)
automatic stay, although scattered throughout various portions of the Act, was a prominent feature of Bankruptcy Act jurisprudence.

Where provisions of the 1898 Act and 1978 Code are similar, interpretations made under the Act have been applied under the Code. See, e.g., Matter of Kilson, 83 B.R. 198, 201 (Bankr. D. Conn. 1988). In addition, this rule is binding upon rather than merely discretionary with the courts. In re Parlato, 185 B.R. 413, 416 (Bankr. D. Conn. 1995). Given the similarity between Rules of Bankruptcy Procedure 401(a) and 601(a) under the Act and Section 362(a) of the Code, this principle therefore mandates adoption of the void ab initio point of view by all circuits.

More than principles of mere statutory construction are involved in this question, of course. As this Court has noted, "[w]hen Congress amends the bankruptcy laws, it does not write 'on a clean slate.'" Dewsnup v. Timm, 502 U.S. 410, 419 (1992). Thus, "[w]e will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 563 (1990). See also Kelly v. Robinson, 479 U.S. 36, 47 (1986); and Midatlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494, 501 (1986), both of which decisions followed this principle. In other words, "[t]he Bankruptcy Code should not be read to abandon past bankruptcy practice absent a clear indication that Congress intended to do so." In re Bonner Mall Partnership, 2 F.3d 899, 912 (9th Cir. 1993), cert. granted sub nom. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, ___ U.S. ___, 114 S.Ct. 681, motion denied and case dismissed as moot, ___ U.S. ___, 115 S.Ct. 386 (1994).

There is, in fact, nothing whatever in the legislative history of Section 362(a) that dictates the conclusion that Congress intended to depart from the Kalb doctrine as it has been interpreted and applied during the life of the Act by both the cases and the

commentators. Indeed, when the Commission Report proposed an automatic stay in its draft of a model bankruptcy enactment, it assumed (based upon prior law) that "[a]ny judgment, order, levy, or other act in disregard of the stay provided by this section would be null and void." Commission Report § 4-501, Note 12, citing Kalb v. Feuerstein, supra.

The legislative history generated by the progress of the Bankruptcy Reform Act of 1978 reveals no expression of views on the matter by Congress in either the House and Senate Reports or in his floor debates in each chamber. Nevertheless, the prominence of the Kalb decision in bankruptcy jurisprudence, the adoption of the "null and void" point of view in the Commission Report's draft of a new model act, and the utter silence of Congress to the contrary on the issue, all combine to entail that Section 362(a) should be read as being consistent with prior law. As the ninth circuit formulated the point, "[o]nce it has been shown that Congress was aware of a pre-Code practice, the remaining inquiry under Dewsnup and Davenport is whether it has made clear its intent to change that practice." In re Bonner Mall Partnership, supra, 2 F.3d at 912. As that court went on to note, "[w]here the text of the Code does not unambiguously abrogate pre-Code practice, courts should presume that Congress intend it to continue unless the legislative history dictates a contrary result. See Dewsnup, [502] U.S. at [419], 112 S.Ct. at 779." Id. at 913.

In the present case, these factors entail that Section 362(a) should be interpreted according to Kalb. Although automatic stay litigation under the Code is certainly more pervasive than it was under the Act, there can be little doubt that "null and void" was the ultimate prevailing view under the 1898 enactment. Nothing in the drafting process of the new Code offers any reason whatever to depart from that interpretation.

Even apart from the persuasiveness of the Kalb doctrine and other authorities discussed herein, it is in fact the case that the Section 362(a) stay is markedly broader than its counterpart under the Act. F. Kennedy, "Automatic Stays under the New Bankruptcy Law," 12 U. Mich. J. L. Ref. 1, 14-15 (1978). The case law supports that notion. Given the fact that "[t]he automatic stay is one of the fundamental protections provided by the bankruptcy law," H.R. Rep. No. 95-959, 95 Cong., 2d Sess. 34 (1978), reprinted in 1978 U.S.Code Cong. & Admin.News 5878, 5963, 6296-97, it begs credulity that Congress would have intended mere voidability rather than voidness as the proper fate of acts taken in violation of the stay. Given the history of the stay under the Act, it simply cannot reasonably be assumed that Congress would have undertaken such a significant change in the law sub silentio.

As a result, it is clearly the case that acts committed in violation of the automatic stay have almost uniformly been considered void ab initio under both the Bankruptcy Act and the Bankruptcy Code. Petitioners believe that this historical continuity, when combined with the overwhelming weight of present authority, mandates a grant of the Writ here sought and a subsequent disapproval of the voidability view espoused by the fifth and federal circuits. Whether one applies a plain meaning interpretation of Section 362(a), see United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989), or principles of holistic statutory construction, see United Savings Association of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988), the result is the same: Acts in violation of the automatic stay are void ab initio. See generally, C. Cuevas, "The Rehnquist Court, Strict Construction and the Bankruptcy Code, 42 Clev. St. L. Rev. 435, 440-48 (1994).

The question could well arise at this point as to

what difference it actually makes whether a circuit adopts one view or the other. To conclude that it makes no difference at all would, needless to say, render consideration of the issue in this forum a waste of the Court's time. After all, those courts which opt for voidability are willing to void an act committed in violation of the stay when the facts and equities of the case so dictate. See, e.g., In re Sapp, 91 B.R. 520, 522 (Bankr. E.D. Mo. 1988). Likewise, even those circuits which consider such acts void ab initio will, when circumstances demand, annul the stay so as legitimatize the otherwise offending act after the fact. See, e.g., In re Siciliano, 13 F.3d 748, 751 (3rd Cir. 1994).[4] This is true even in those circuits which strongly adhere to the void ab initio point of view. Algernon, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1425 (9th Cir. 1985). Because both approaches embody sufficient flexibility to decree either voidness or legitimization regardless of their respective starting points, this dispute might seem to be one of mere academic theory rather than one of practical effect.

Such a dismissal of the difference between these two approaches would be wrong, however, because it would overlook some highly unfavorable implications for the efficacy of the automatic stay were the voidability rule uniformly to be applied. If an act committed in violation of the stay is merely voidable, the debtor (or trustee) is required to take actual affirmative action to avoid it, whereas an act that is void ab initio would

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[4] This exercise of the specific power granted in Section 362(d) to "annul[]" the stay is not to be confused with the general equitable power of bankruptcy courts simply to deny the protection of the stay to a debtor who remains "stealthily silent" in the face of a creditor's unwitting violation of the stay. See In re Smith Corset Shops, Inc., supra, 696 F.2d at 976-77. Such principles are not applicable here, for the Petitioners took action as soon as they learned of the Respondents' violation of the stay.

require no such action to gain that status. In other words, even if an act "is determined to violate the automatic stay, it is nevertheless effective until voided." In re Thurman, 163 B.R. 95, 102 (Bankr. W.D. Tex. 1994). Certainly, a legislative enactment intended to be "one of the fundamental protections provided by the bankruptcy law," H.R. No. 95-959, 95th Cong., 1st Sess. 340 (1978), reprinted in 1978 U.S.Code Cong. & Admin.News 5878, 5963, 6296-97, would lose a significant portion of its force if positive action by the debtor or trustee were required to trigger the process by which acts in violation of that stay were to be avoided. After all, "[n]othing in the Code or the legislative history suggests that Congress intended to burden a bankruptcy debtor with an obligation to fight off unlawful claims." In re Schwartz , 954 F.2d 569, 571-72. (9th Cir. 1992).

In addition, the detriment to debtors under the voidability rule is more significant than the mere time and effort it would take to have the voidness of such violative acts judicially decreed. Where a debtor or trustee failed to take prompt steps to attack the act violating the automatic stay, he could find himself saddled with the effects of the offending act notwithstanding its unlawful character. In In re Thurman, supra, for example, the trustee found himself "barred by the statute of limitations provision of § 549(d)" from even attacking the otherwise illicit act." 163 B.R. at 102. If the act had been void ab initio, one supposes that the trustee would have faced no such limitations problem in avoiding the tax liens in issue.[5] Even more serious, the debtor might simply fail to take

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[5] This is not to deny a bankruptcy court's power in egregious cases to apply laches to bar inequitable attempts by debtors to achieve a voidness result. See, e.g., Matthews v. Rosene, 739 F.2d 249, 251 (7th Cir. 1984)(attempt by debtor to employ automatic stay to void 33-month-old state court judgment). Such extreme cases, while they properly test the general rule, should not define it.

any steps at all, a happenstance that would have the effect of rendering the automatic stay a dead letter with respect to that act. It is to be doubted that Congress could have intended such a result.

Approval of the voidability doctrine would also put a premium on a creditor's commission of acts in violation of the stay:

> Concluding that acts in violation of the automatic stay were merely voidable would have the effect of encouraging disrespect for the stay by increasing the possibility that violators of the automatic stay may profit from their disregard for the law, provided it goes undiscovered for a sufficient period of time. This may be an acceptable risk to some creditors when measured against a delayed pro-rata distribution.

In re Garcia, 109 B.R. 335, 340 (N.D. Ill. 1989). The very automatic nature of the stay therefore demands a parallel and automatic nullification of acts taken in violation of that stay. Anything less, i.e., a continuation of present fifth and federal circuit practice, would have the effect, as Petitioners discovered to their cost, of turning what was intended as an automatic stay into a notice statute that all too often would bind only those creditors who happened actually to be aware of it.

A review of the circuit court opinion in this case is complicated somewhat by the fact that, although the court repeated in no uncertain terms its view that it is "well settled" that violations of the automatic stay are voidable but not void ab initio, it muddied the analytic waters somewhat in the process. Fearing that "[p]erhaps our language in Picco and Sikes may have occasioned some confusion in the courts a quoi," the court suggested in its footnote 3 that it is not offending post-petition acts committed in violation of the stay that are

voidable; rather, it is "the effect of the stay itself which is voidable, subject to the broad discretion afforded a bankruptcy judge under section 362" (A-7).

In light of that formulation, the court found that the bankruptcy court had "merely exercised its discretion to modify the stay, as section 362(d)(3) authorizes, thereby validating the foreclosure and transfer of title to the [Respondents]" (A-7). This recasting of the rule of Picco and Sikes suggests that the fifth circuit was modifying the so-called "voidable" rule for something akin to a void ab initio subject to annulment point of view that is closer to the one championed by Petitioners in these proceedings, and espoused by the majority of circuits.

This tentative step away from Picco and Sikes, if indeed that is what it is, does not entail denial of the Petition in this case, however. First, the language to which footnote 3 of the circuit court opinion is appended makes it clear that the fifth circuit still subscribes to the voidable rather than void ab initio view. Second, a close examination of the bankruptcy court opinion reveals that the only Section 362(d)(2) action taken in that court was a modification of the stay to permit eviction, not foreclosure (A-15). The bankruptcy court did not take any action whatever to validate the foreclosure and transfer of title; rather it simply held that under Section 549(c) the foreclosure and transfer of title were not subject to attack by the trustee (or debtor in possession)(A-14 to -15). Under the bankruptcy judge's view, the foreclosure and transfer of title, far from needing judicial validation by the court, were validated by the terms of the statute itself--or so Petitioners read that opinion to entail. The gloss therefore placed by the circuit court in its footnote 3 upon its earlier views in Picco and Sikes does not render unnecessary the need for this Court to settle the inter-circuit dispute over the void ab initio/voidable issue.

Petitioners respectfully submit, therefore, that the Writ here sought should be granted, and that the voidability rule expressed by the fifth circuit should be expressly disapproved.

2. **This case also involves a conflict between the fifth and ninth circuits (and within the seventh and eleventh circuits) over whether the foreclosure action in issue had to satisfy the terms of 11 U.S.C. § 549(c) even assuming it was properly not avoided for violating the automatic stay.** The Debtors argued below that 11 U.S.C. § 549(c) precluded a bestowal upon judicial vitality to the foreclosure sale. This was so because much the better view is that a purchaser at his own foreclosure sale does not give "present fair equivalent value," 11 U.S.C. § 549(c), by buying in at those proceedings.[6] The circuit court, however, assumed in its

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[6] The bankruptcy court relied upon In re Ward, 837 F.2d 124 (3rd Cir. 1988); In re Bernard, 21 B.R. 287 (Bankr. E.D. Pa. 1982); and In re McGowan, 19 B.R. 952 (Bankr. E.D. Pa. 1982), to reach a contrary result (Appendix D). But the court in Ward expressly declined to rule on the "present fair equivalent value" issue at all. 837 F.2d at 127 n.7. Moreover, although Bernard and McGowan did hold that the post-petition sale was entitled to Section 549(c) protection, these decisions are no longer followed even in the rendering district. See In re Purnell, 92 B.R. 625, 630 n.7 (Bankr. E.D. Pa. 1988)("the intent of [Section 549(c)] is not to protect mortgagees at a foreclosure sale"). See also In re Williams, 100 B.R. 726, 727 (Bankr. M..D. Pa. 1989)(following Purnell). The better view, as set out in In re Penfil, 40 B.R. 474, 477-78 (Bankr. E.D. Mich. 1984), is that a "foreclosing mortgagee cannot claim to have parted with the present fair equivalent value necessary to give it protection under this part of § 549(c)." See also In re Briglevich, 147 B.R. 1015, 1020-21 (Bankr. N.D. Ga. 1992) (satisfaction of prior indebtedness is not "present fair equivalent value"); 4 L. King, Collier on Bankruptcy ¶ 549.02[3] at 549-12 n.7 (15th ed. 1995)("A mortgagee who forecloses on a debtor's property without knowing of the commencement of a bankruptcy case was not intended to be protected by section 549(c)"); Rochelle & (continued...)

footnote 6 that because the foreclosure sale "was retroactively authorized by the court under section 362(d)(2) [that t]he section 549(c) exception is therefore not implicated in this case[.]" (A-8).[7]

This view of the relationship between Sections 362(d)(2) and 549(c), one which was neither urged by the movants nor discussed by the Debtors, is plainly wrong. Even if an otherwise void or voidable transaction is "retroactively authorized by the court under section 362(d)," (A-8), the transaction must still pass the Section 549(c) test exactly as it would been required to do absent any automatic stay issues in the case.

The court in In re Schwartz, supra, 954 F.2d at 574, gave valuable guidance on this issue by noting that

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[6](...continued)
Feder, "Unauthorized Sales of a Debtor's Property: The Rights of a Purchaser under Section 549 of the Bankruptcy Code," 57 Am. Bankr. L.J. 23, 35 n.60 (1983)(same). As a result, Petitioners believe that the bankruptcy and district courts took quite the wrong side of this conflict among bankruptcy courts over whether buying in at one's own foreclosure sale constitutes "present fair equivalent value" within the meaning of Section 549(c). The approach adopted by the circuit court avoided the need to resolve this issue; in the process, however, the court fell into the error of assuming that the act of passing muster under Section 362(d)(2) constitutes a simultaneous satisfaction of Section 549(c). Nevertheless a conflict worthy of resolution by this Court exists with respect to this Section 549(c) "present fair equivalent value" issue as well.

[7] This characterization of the bankruptcy court opinion cannot withstand scrutiny because the bankruptcy court did not in fact utilize section 362(d)(2) to validate the foreclosure and transfer of title. Thus, In this view, the circuit court opinion as rendered can gather neither factual support nor logical force from the bankruptcy court opinion it was reviewing.

"Section 549 exists as a protection for creditors against unauthorized debtor transfers of estate property. Although there are circumstances where section 362 overlaps section 549 and renders it unnecessary, this overlap falls far short of rendering section 549 meaningless." Indeed, the court in Schwartz pointed out the error of the circuit court's premise in its footnote 6 by noting that "[i]f violations of the automatic stay are not void because there is a narrow exception under subsection 549(c), then by the same reasoning the rest of section 549 would be invalid because subsection 549(c) creates an exception to the trustee's power to avoid postpetition transfers." Id.

Rather, the actual function of Section 549(c) exists wholly apart from the provisions of § 362(d)(2) because "Congress did not draft subsection 549(c) to demonstrate that violations of the automatic stay are merely voidable; Congress drafted subsection 549(c) to protect good faith purchasers where the sale would otherwise be subject to avoidance under section 549 or void under section 362." Id. Even if the foreclosure sale in the present case had been voidable instead of void, in other words, it does not follow that the Respondents necessarily paid reasonably equivalent value for the property at the foreclosure sale so as to fit the transaction within the boundaries of Section 549(c). In short, "the general proposition [is] that sections 362 and 549 usually apply to a different set of transactions." Id. For the circuit court to conflate these two Sections in its footnote 6 so as to avoid a consideration of the Debtors' Section 549(c) argument is wrong; it permits the determinative issue in this case to go unexamined by default.

One assumes that the circuit court disposed of the Section 362 and Section 549 arguments in one fell swoop on the supposed ground that so long as the bankruptcy court granted relief to the Movants under

Section 362(d)(2), the very act of so doing assumes that Section 549(c) was satisfied in the process. But an examination of the bankruptcy court decision reveals that this court did not engage in the conflation of issues favored by the circuit court. Rather, the bankruptcy court first analyzed the foreclosure sale in terms of Section 549(c). Having concluded that "[t]he foreclosure sale meets all the requirements of § 549(c) and, therefore, cannot be avoided by the Debtors," (A-15), the court went on separately to analyze the requirements of Section 362(d)(2). Only when the court had determined that both Sections 549(c) and 362(d)(2) were satisfied, was it able to grant the Movants the relief they requested. The effect of the circuit court's footnote 6 was to allow the Respondents undeservedly to escape an analysis of the foreclosure sale under Section 549(c).

The Court's reliance in its footnote 6 upon the portion of Section 549(a) exempting from the trustee's right to avoid transfers of transactions "'authorized . . . by the court'" (A-8), as a rationale for avoiding a Section 549(c) analysis gives much too broad a reading to that statutory language. The flaw in this reasoning is revealed by the court's own observation that "[i]t is the effect of the stay itself which is voidable[.]" (A-6) (emphasis supplied). In other words, merely to avoid the effect of the stay under Section 362(d)(2) is not the equivalent of authorizing the actual sale under Section 549(a)--even after the fact. In short, in its decision the circuit court glossed over an important distinction--and necessary determination--which demands amplification in this forum. Cf. In re Servico, Inc., 144 B.R. 933, 935 (Bankr. S.D. Fla. 1992)("this Court interprets § 549(a) to apply to postpetition transfers of property of the estate which are neither authorized, nor expressly prohibited;" emphasis by the court).

The importance of this issue was pointed out in

In re Servico, Inc., supra, 144 B.R. at 935, as follows:

> This Court is aware that if the automatic stay is annulled in cases where the purchaser fits within § 549(c), it will have reached the same result as if such transfers were initially declared not void. However, this is not a distinction without a difference.

(Emphasis supplied). The court in Servico, it is true, made that observation in the context of assuming that "all acts in violation of the automatic stay [are] void[.]" Id. But the point is valid even in a circuit like the fifth which assumes--wrongly, by the Debtors' lights--that such acts are voidable rather than void ab initio. As the court pointed out in In re Hill, 156 B.R. 998, 1007 (Bankr. N.D. Ill. 1993), "[s]ection 549(c) is an exception to section 362 regardless of whether violations of the automatic stay are void or voidable." (emphasis supplied). See also In re Schwartz, supra, 954 F.2d at 574 (same). The Court's failure to give separate effect to both Sections 549(c) and 362(d)(2) violates the "principles of statutory construction [that] where possible statutes must be read so as to give meaning to each statute and should be construed in harmony, rather than conflicting with each other." In re Hill, supra, 156 B.R. at 1007 (citations omitted). For this reason alone the circuit court decision in this matter is fatally flawed, as the Schwartz, Servico, and Hill decisions plainly entail. At the very least, the circuit court's own avoidance of the Section 549(c) issue cannot be justified.

The Petitioners maintain, of course, that the circuit court's adherence to the voidable rather than void ab initio school of thought misperceives Section 362(a). But even were that interpretation of the automatic stay correct, the circuit court erred nevertheless in assuming that the perceived overlap between Sections 362(d)(2) and 549 dictates that a judicial refusal to find a transaction void under the

former enactment simultaneously satisfies the requirements of the latter Section. The court's assumption in its footnote 6 that a retroactive authorization of Respondents' foreclosure entails that "[t]he section 549(c) exception is therefore not implicated in this case" (A-8), wrongfully strips Petitioners of an important protection of which the drafters of the legislation never intended to deprive them.

The Petitioners' view that a post-petition foreclosure must, to be validated in some appropriate fashion after the fact, pass muster under both Section 362(d)(2) and Section 549(c), is a correct reading of the Code. But whether a post-petition foreclosure is to validated by way of an annulment of the automatic stay or through a refusal to void the action, it is important to clarify whether a grant of relief under Section 362(d)(2), standing alone, is sufficient to validate the act, or whether the requirements of Section 549(c) must be satisfied as well. Petitioners urge the Court to find that any validation of the foreclosure is a two-step process involving both Sections.

This is, of course, the reading of the Code adopted explicitly by the ninth circuit, In re Schwartz, supra, and at least implicitly within the seventh, In re Hill, supra, and eleventh circuits. In re Servico, Inc., supra. The result is a conflict between and among the circuits which the Court should also resolve in the interest of a uniform application of the bankruptcy laws. The Petitioners therefore respectfully ask the Court to grant their Petition for a Writ of Certiorari.

CONCLUSION

Therefore, and for all the foregoing reasons, Petitioners respectfully request that this Court issue a writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted

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APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 95-40126

In RE: LEROY JONES; PAULA FAYE JONES
Debtors

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LEROY JONES; PAULA FAYE JONES
Appellants

v.

ALFRED GARCIA; ROSIE A GARCIA
Appellees

Appeal from the United States District Court for the
Eastern District of Texas, Beaumont

ON PETITION FOR REHEARING

(October 25, 1995)

Before POLITZ, Chief Judge, HIGGINBOTHAM and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing

filed in the above case is denied.

ENTER: This 25th day of October, 1995.

/S/Henry A. Politz
UNITED STATES CIRCUIT JUDGE

APPENDIX B

In re Leroy JONES and Paula Faye Jones, Debtors.

Leroy JONES and Paul Faye Jones, Appellants,
v.
Alfred GARCIA and Rosie A. Garcia, Appellees.
No. 95-40126
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Sept. 11, 1995.

Chapter 13 debtors sued holders of deed of trust on debtor's property who foreclosed and purchased property at foreclosure sale alleging that foreclosure sale was void because it occurred postpetition. The Bankruptcy Court declined to void transfer of title and permitted purchasers to evict debtors, 172 B.R. 535. Debtors appealed. The United States District Court for the Eastern District of Texas, Joe J. Fisher, J., affirmed. Debtors appealed. The Court of Appeals, Politz, Chief Judge, held that because holders of deed of trust received neither actual nor presumed constructive notice of bankruptcy filing until after title had transferred to them, postpetition foreclosure sale and purchase of property by holders of deed of trust was not void.

Affirmed.

1. Bankruptcy 2462

Postpetition foreclosure under deed of trust given a security for payment of purchase price and purchase of property at foreclosure sale by holders of deed of trust was not void because it occurred after effective date of automatic stay, where holders of deed of trust, who were not commercial lenders, received neither actual nor presumed constructive notice of bankruptcy filing until after title had transferred to them. Bankr. Code, 11 U.S.C.A. 362(a,d).

2. Bankruptcy 2588

Provision of Bankruptcy Code exempting good-faith purchasers from trustee's authority to avoid certain unauthorized postpetition transfers of property was not implicated with respect to postpetition foreclosure under deed of trust and purchase of property at foreclosure by holders of deed of trust, where foreclosure and sale were retroactively authorized by bankruptcy court under automatic stay provision of Code. Bankr.Code, 11 U.S.C.A. 362(d), 549(a, c).

Appeal from the United States District Court for the Eastern District of Texas.

Before POLITZ, Chief Judge, HIGGINBOTHAM and BENAVIDES, Circuit Judges.

POLITZ, Chief Judge:

Leroy Jones and Paula Faye Jones, Chapter 13 debtors, appeal a judgment approving a post-petition foreclosure upon their real property. Concluding that there

was neither error not abuse of discretion in the district court's modification of the statutory stay[1] to retroactively validate the foreclosure, we affirm.

Background

In March of 1989 the Joneses purchased certain real property in Beaumont, Texas from Alfred and Rosie A. Garcia, giving in payment a promissory note for $27,000. The resulting mortgage was secured by a Deed of Trust duly filed in the records of Jefferson County, Texas.

The Joneses defaulted on the note in 1991 causing the Garcias to commence foreclosure proceedings. In response the Joneses sought relief under Chapter 13 of the Bankruptcy Code, staying the foreclosure. Payments were resumed but the Joneses again defaulted on their note in March of 1994 and foreclosure proceedings were again instituted. On May 5, 1994 the Joneses dismissed their Chapter 13 proceedings and a copy of the motion was served on the Garcias.

On May 16, 1994 the Garcias accelerated the Jones mortgage note. A few days later the Joneses filed a second Chapter 13 petition but no notice of same was served on the Garcias nor was a notice filed in the pertinent Jefferson County property records. Unaware of the new bankruptcy proceeding the Garcias continued with the foreclosure and on June 7, 1994 purchased the property at the foreclosure sale.

---

1. 11 U.S.C. § 362(a).

Sometime thereafter counsel for the Garcias was notified of the new Chapter 13 filing and the Garcias sought authority to pursue an eviction action against the Joneses who continued to maintain possession of the property. The Joneses maintained that the foreclosure sale was void because it occurred after their bankruptcy filing which triggered the automatic stay. The bankruptcy judge declined to void the transfer of title, finding that the Garcias were good faith purchasers without notice of the bankruptcy filing and therefore protected by Section 549(c) of the Bankruptcy Code.[2] The district court affirmed modifying the automatic stay and the Joneses timely appealed.

Analysis

[1] The Joneses maintain that the foreclosure and subsequent sale of their Beaumont property is void because it occurred after the effective date of the automatic stay under 11 U.S.C. § 362(a) and, therefore, the Garcias have no legal right to evict them. The Joneses misperceive the law. It is well-settled that "actions taken in violation of the automatic stay are not *void*, but rather they are merely *voidable*, because the bankruptcy court has the power to annul the automatic stay pursuant to section 362(d)."[3]

---

2. 11 U.S.C. § 549(c).

3. Picco v. Global Marine Drilling Co., 900 F.2d 846, 850 (5th Cir.1990), citing Sikes v. Global Marine, Inc., 881 F.2d 176 (5th Cir.1989). See also In re Calder, 907 F.2d 953 (10th Cir.1990) (allowing proof of claim based on state court judgment entered after bankruptcy petition filed); In re Ward, 837 F.2d 124 (3rd Cir.1988) (post-stay foreclosure and sale is valid if purchaser qualifies for section 549(c) exception);

[2] Of particular significance to today's disposition is the power of the courts *a quo* to terminate, annul, modify, or condition the automatic stay, insofar as it concerns "an act against single asset real estate," in favor of "a creditor whose claim is secured by an interest in such real estate."[4] The judgment appealed specifically relies upon section 362(d) for its modification of the automatic stay. Given the fact that the Garcias, who are not commercial lenders, received neither actual nor presumed constructive notice of the Joneses'

In re Albany Partners, Ltd., 749 F.2d 670 (11th Cir.1984) (bankruptcy courts power to "annul" stay includes retroactive validation of acts in violation of the stay); Matthews v. Rosene, 739 F.2d 249 (7th Cir.1984) (laches barred debtor's attempt to void state court judgment entered after automatic stay); In re Smith Corset Shops, Inc., 696 F.2d 971 (1st Cir.1982) (post-stay state court default judgment and execution of that judgment not void where debtor concealed bankruptcy filing from creditor).

Perhaps our language in Picco and Sikes occasioned some confusion in the courts a quo. Our statement in Picco that actions taken in violation of the stay are voidable must be understood in context. It is the effect of the stay itself which is voidable, subject to the broad discretion afforded a bankruptcy judge under section 362. In this case, the district court merely exercised its discretion to modify the stay, as section 362(d)(3) authorizes, thereby validating the foreclosure and transfer of title to the Garcias.

4. 11 U.S.C. § 362(d)(3).

bankruptcy filing until after title had transferred to them,[5] we perforce conclude that there was neither error not an abuse of the discretion afforded the court by section 362(d).[6]

The judgment of the district court is AFFIRMED.

---

5. Compare Calder, supra 907 F.2d at 956 ("courts will apply equitable considerations at least where the creditor was without actual knowledge of a bankruptcy petition and the bankrupt's unreasonable behavior contributed to the bankrupt's plight").

6. The bankruptcy judge found that the Garcias were not subject to the automatic stay's effect because they qualified for the good faith purchaser exemption in 11 U.S.C. § 549(c). This provision serves as an exception to the discretionary authority of the bankruptcy trustee to "avoid" certain transfers of property under section 549(a). Section 549(a), however, expressly exempts from the trustee's authority transactions "authorized ... by the court," including transactions such as that involved in this case which was retroactively authorized by the court under section 362(d). The section 549(c) exception is therefore not implicated in this case; the transfer of the title at issue is not one of the class of transactions which section 549(a) allows the bankruptcy trustee to avoid.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

BEAUMONT DIVISION

IN RE:	§	
	§	
LEROY JONES AND	§	
PAULE FAYE JONES	§	CAUSE NO. 1:94 CV 672
	§	ON APPEAL
DEBTORS-APPELLANTS	§	
	§	
VS.	§	
	§	
ALFRED GARCIA AND	§	
ROSIE A. GARCIA	§	
	§	
MOVANTS-APPELLEES	§	

JUDGMENT AFFIRMING THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TEXAS BEAUMONT DIVISION

The appeal of Leroy Jones and Paula Jones, Appellants, from an Order entered and filed on October 4, 1994 by the United States Bankruptcy Court for the Eastern District of Texas, Beaumont Division, came before this Court for consideration.

The record reflects that oral argument was not requested by either party and this Court, after examining the briefs and record, is of the opinion that oral argument is not

needed and would not be helpful in the decisional process. This Court finds that the decision of the Bankruptcy Court modifying the automatic stay provided by 11 U.S.C. 362(a) to permit Appellees to proceed with a forcible entry and detainer action as to the property described in said Order is correct as a matter of law and the decision of the United States Bankruptcy Judge should be in all things AFFIRMED.

It is therefore ORDERED, ADJUDGED AND DECREED that the Order entered and filed on October 4, 1994 by the United States Bankruptcy Court for the Eastern District of Texas, Beaumont Division, modifying the automatic stay to allow Alfred S. and Rosie A. Garcia to proceed with the forcible entry and detainer action and such other actions as may be necessary to regain possession of the property described therein is in all things AFFIRMED. Costs of this appeal are taxed against Appellants.

SIGNED this 2nd day of February, 1995.

/S/ JOE J. FISHER
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF TEXAS

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

IN RE:	§	
	§	
LEROY JONES and	§	CASE NO. 94-10423
PAULA FAYE JONES,	§	CHAPTER 13
	§	
Debtors.	§	

OPINION

COMES NOW before the Court pursuant to regular setting the Motion of Alfred S. Garcia and Rosie A. Garcia for Relief from Automatic Stay. This opinion constitutes findings of fact and conclusions of law in accordance with Fed.R.Bankr.P. 7052 and disposes of all issues before the Court.

FACTUAL AND PROCEDURAL BACKGROUND

In March of 1989, Debtors purchased a certain tract of land from Movants knows as:

> Lot Nineteen (19) in Block Two (2) of SOUTH PARK THIRD ADDITION to the City of Beaumont, Jefferson County, Texas, according to the map or plat of record in Volume 8, Page 166, Map Records in the office of the County Clerk of said County and State.

Movants held a valid security interest in the form of a mortgage and lien on the above property. Movants' mortgage and lien were perfected and secured by a Deed of Trust filed of record in the Real Property Records of Jefferson County, Texas. Said Deed of Trust secured a promissory note (the "Note") payable to Movants by Debtors in the amount of $27,000.

Debtors first defaulted on the Note in 1991 and foreclosure proceedings were commenced. Debtors subsequently filed for relief under Chapter 13 of the Bankruptcy Code on June 20, 1991, Case No. 91-10690. Debtors' confirmed Chapter 13 plan proposed to pay Movants' claim directly outside the plan. In March 1994, Debtors' defaulted on the Note and foreclosure proceedings were again commenced.

On May 5, 1994, Debtor filed a Motion to Dismiss 91-10690 which was served on Movants through their attorney. Movants accelerated the Note on May 16, 1994.

On May 23, 1994, Debtors filed the current Chapter 13 proceeding. Notice of the proceeding was sent to an incorrect address and apparently never received by Movants. No petition has been filed in the Real Property Records of Jefferson County.

On June 7, 1994, Movants purchased the property for $28,000 at a properly noticed Trustee Sale. The Trustee's Deed was properly recorded.

Sometime after June 7, 1994, Movants' attorney was notified that a new Chapter 13 proceeding had been commenced.

Movants subsequently filed this Motion to Lift Stay to permit Movants to commence a forcible entry and detainer action against Debtors.

DISCUSSION OF LAW

The Court must first determine the validity of the foreclosure sale before it can determine whether the stay should be lifted to permit forcible entry and detainer.

It is undisputed that the foreclosure sale occurred postpetition and is therefore in violation of the automatic stay provided by §362(a). 11 U.S.C. §362(a). The question, therefore, becomes whether violations of the automatic stay are automatically void or merely voidable.

Debtor cites In re Schwartz, 954 F.2d 569, 572 (9th Cir. 1992) for the proposition that violations of the automatic stay are void. However, the Fifth Circuit clearly holds that violations of the automatic stay are merely voidable. Picco v. Global Marine Drilling Co., 900 F.2d 846,850 (5th Cir. 1990); Sikes v. Global Marine, Inc., 881 F.2d 176,179 (5th Cir. 1989). Even if this Court were inclined to follow the line of jurisprudence that holds any violation of the automatic stay to be an absolutely void act, it cannot do so. The Fifth Circuit opinions cited above clearly show that the Court analyzed this issue carefully and considered the conflicting authority before arriving at a well reasoned decision. Consequently, this Court must hold that violations of the automatic stay are merely voidable.

Since violations of the automatic stay are merely voidable, the Court must look to §549 to determine whether the foreclosure sale can be avoided by the Debtor. Under §549(c):

> The trustee may not avoid...a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser...could not acquire an interest that is superior to the interest of such good faith purchaser...

11 U.S.C. 549(c).

Debtor asserts, without citation of authority, that the purchase of property by the mortgagee at a foreclosure sale is not the type of transaction contemplated by 549(c) . However, several cases have found that foreclosure sales do fall within the protection of 549(c). See In re Ward, 837 F.2d 124 (3rd Cir. 1988); In re Bernard, 21 B.R. 287 (Bkrtcy.E.D.Pa. 1982); In re McGowan, 19 B.R. 952 (Bkrtcy.E.D.Pa. 1982).

In Ward, the court held that the foreclosure sale was not protected by 549(c) simply because the mortgagee failed to perfect its claim against a hypothetical subsequent bona fide purchaser. Ward, 837 F.2d at 127. This holding indicated that had the mortgagee perfected its claim, the sale would have been protected by 549(c) and would not be set aside.

In Bernard and McGowan the mortgagees properly perfected their claims. Consequently, the court determined that the mortgagees held valid title to the property pursuant

to the foreclosure sale. Bernard, 21 B.R. at 289; McGowan, 19 B.R. at 954.

In the present case, Movants did not have knowledge of the commencement of the case; Movants purchased the property at a foreclosure sale for present fair equivalent value; there was not copy of notice of the petition filed in the Real Property Records of Jefferson County; and Movants perfected their claim by properly recording the Trustees Deed prior to learning of the commencement of the Chapter 13 case. The foreclosure sale meets all of the requirements of §549(c) and, therefore, cannot be avoided by Debtors. In fact, the Court has no pleadings before it requesting that it consider voiding the foreclosure sale. The Debtor presented no evidence to support that position and relied completely on his argument that the foreclosure sale was simply void ab initio. The Movants have valid title to the property.

The decision to grant relief under §362(d)(2) is not purely discretionary; the statue provides that the court shall grant relief if the two conditions in §362(d)(2)(A) and (B) are met. Gateway North Estates, Inc. v. Bailey, 169 B.R. 379,382 (E.D.Mich. 1994). The two conditions set forth in § 362(d)(2) are: (A) the Debtor does not have an equity interest in the property; and (B) such property is not necessary to an effective plan of reorganization. Id. The Court has already determined that Movants hold valid title to the property. Therefore, Debtor has no equity in the property and the property is not essential to a plan of reorganization.

The only defense raised by the Debtor to the Motion for Relief From Stay was the assertion that the transfer of title to Movants was void as a violation of the automatic stay. The Court has determined the transfer was not void and Movants have perfected title to the property and therefore, the

Court concludes that Movants are entitled to relief from stay under 362(d)(2) to commence forcible entry and detainer proceedings. Bernard, 21 B.R. at 289-90.

The automatic stay provision of 362(a) will be modified to permit Movants to proceed with a forcible entry and detainer action against Debtors.

SIGNED this 28th day of September, 1994.

/S/DONALD R. SHARP
U. S. BANKRUPTCY JUDGE

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

IN RE:	§	
	§	
LEROY JONES and	§	CASE NO. 94-10423-S
PAULA FAYE JONES	§	
	§	Chapter 13
DEBTORS	§	

MOTION OF ALFRED S. GARCIA AND ROSIE A. GARCIA FOR RELIEF FROM AUTOMATIC STAY

ANY OBJECTION OR REQUEST FOR HEARING MUST BE FILED WITH:

UNITED STATES BANKRUPTCY COURT
350 MAGNOLIA, SUITE 117
BEAUMONT, TEXAS 77701

UNLESS A WRITTEN OBJECTION OR REQUEST FOR HEARING IS FILED WITHIN FIFTEEN (15) DAYS, INCLUSIVE OF MAILING TIME, FROM THE DATE SHOWN IN THE CERTIFICATE OF SERVICE HEREIN, THIS MOTION SHALL BE DEEMED TO BE UNOPPOSED AND THE COURT MAY ENTER AN ORDER WITHOUT A HEARING, AT THE END OF 30 DAYS, REFLECTING THAT THE AUTOMATIC STAY HAS LIFTED.

TO THE HONORABLE JUDGE OF SAID COURT:

ALFRED S. GARCIA and ROSIE A. GARCIA, Movants, file this Motion to Lift Stay and respectfully show the Court the following:

I.

Movants, ALFRED S. GARCIA and ROSIE A. GARCIA, are secured creditors of LEROY JONES and PAULA FAYE JONES, referred to as Debtors.

II.

This is an action under 11 U.S.C. 362 to lift the automatic stay granted under 11 U.S.C. 362(a) and to permit forcible entry and detainer of Movants' property. This Court has jurisdiction of this action under 28 U.S.C. 1334.

III.

Movants hold a fee simple interest pursuant to a Trustee's Deed in a certain tract of land occupied by Debtors and knows as:

> Lot Nineteen (19) in Block Two (2) of SOUTH PARK THIRD ADDITION to the City of Beaumont, Jefferson County, Texas, according to the map or plat of record in Volume 8, Page 166, Map Records in the office of the County Clerk of said County and State.

IV.

Movants held a valid security interest in the form of a mortgage and lien on the above property. Movants'

mortgage and lien were perfected and secured by a Deed of Trust filed of record in the Real Property Records of Jefferson County, Texas. A copy of the Deed of Trust is attached hereto and designated as Exhibit "A".

V.

Exhibit "A" was granted for the purpose of securing payment of a promissory note (hereinafter "Note") payable to ALFRED S. GARCIA and wife, ROSIE A. GARCIA, dated March 3, 1989 and signed by Debtors at Beaumont, Texas in the original principal sum of $27,000.00. A copy of said Note is attached hereto as Exhibit "B".

VI.

In 1991, Debtors defaulted under the Note. Therefore, pursuant to the terms of the Deed of Trust, Movants initiated foreclosure proceedings against the property described above.

VII.

Debtors filed their original Petition for Relief under Chapter 13 on June 20, 1991 under Cause No. 91-10690-S. Debtors' Chapter 13 Plan of Reorganization filed pursuant thereto was confirmed, providing for Movants' claim to be paid directly by Debtors outside of said Plan.

VIII.

Debtors again defaulted under the Note and said confirmed Chapter 13 Plan of Reorganization in March, 1994. Pursuant to the terms of the Deed of Trust, Movants again

initiated foreclosure proceedings against the property described above.

IX.

Although operating under the above confirmed Chapter 13 Plan, Debtors filed a Motion to Dismiss said Chapter 13 case on May 5, 1994. Said Motion was served on Movants' attorney, Thomas J. Sibley, P.C. by Debtors' counsel, Frank J. Maida.

X.

Movants accelerated Debtors' obligation under the Note on May 16, 1994. On May 23, 1994, Debtors refiled for Chapter 13 relief in the instant proceeding. although Movants' counsel had received notice of Debtors' Motion to Dismiss Chapter 13 Case and had mailed numerous default and foreclosure notices to Debtors, no notice of the refiling of Debtors' Chapter 13 bankruptcy was provided to Movants' counsel by Frank J. Maida.

XI.

Additionally, no notice of Debtors' refiling of their Chapter 13 bankruptcy proceeding was provided to Movants, ALFRED S. GARCIA and ROSIE A. GARCIA for the reason that an incorrect and invalid address is shown for Movants on Debtors' verified Creditor Matrix, notwithstanding that Movants' proper address is evidenced on all of the attached loan documents and that Debtors have been making payments to Movants at their true and proper address for years.

XII.

Because Movants had no knowledge of the commencement of the present Chapter 13 case, the property was sold to Movants for $28,000.00, the amount owed to Movants, on June 7, 1994 at the duly scheduled and properly noticed foreclosure sale. A copy of the Substitute Trustee's Deed is attached hereto and incorporated herein as Exhibit "C". Therefore, Movants are bona fide good faith purchasers under the U. S. Bankruptcy Code.

XIII.

At the time of the foreclosure sale, Movants estimate upon their information and belief that the above described property had a fair market value of no more than $28,000.00. In fact, Debtors have valued the property at $26,350.00 in Schedule A of their Chapter 13 Petition.

XIV.

At this time, the Debtors as tenants by sufferance continue to reside in the subject realty, which is not property of the estate of the Debtors, while making no payments for rent or property taxes. Additionally, Movants have no evidence that Debtors are maintaining proper and adequate insurance upon said property. Movants' statutory eviction remedies have been stayed by operate of the automatic stay when Debtors filed for relief herein.

XV.

Debtors have no equity or interest in the subject property and the property is not necessary for an effective

reorganization. Since the property is or would be claimed as exempt, it is of no benefit to the Chapter Thirteen Trustee.

XVI.

Debtors have failed to provide Movants with adequate protection of Movants' interest in the subject property; and the property will deteriorate and decrease in value during the court of this proceeding, thereby impairing Movants' interest.

XVII.

Debtors' attempt to incorporate Movants' accelerated and matured claim within their Chapter 13 Plan and to pay said claim over sixty (60) months is a modification of a claim secured only by a security interest in real property that is the Debtors' principal residence in violation of 11 U.S.C. § 1322(b)(2) and § 1322(b)(5).

XVIII.

Good cause for the lifting of the automatic stay exists because Debtors have violated the requirements of 11 U.S.C. § 1322(b)(2) and § 1322(b)(5) by attempting to modify the terms of the Note and Deed of Trust held by Movants and by attempting to cure Debtors' default on a mature obligation.

XIX.

Movants would show the Court that Debtors have not paid property taxes on the subject property since 1989. Taxes are presently due on said property in the amount of $3,430.29 and are incurring additional penalty, interest and statutory attorney's fees monthly. The Tax Statement for said property dated July 21, 1994 is attached hereto and incorporated herein

as Exhibit "D". Debtors' proposed Chapter 13 Plan provides for payment of property taxes to Jefferson County in the amount of only $323.45.

XX.

Debtors proposed Chapter 13 Plan or Reorganization relies upon LEROY JONES' contribution of $800.00 per month received as his unemployment compensation. It is clearly an unreasonable expectation that LEROY JONES will continue to receive $800.00 per month as unemployment compensation when the maximum allowable length of time for anyone to draw unemployment is twenty-six (26) total weeks and obviously LEROY JONES has already drawn said unemployment for some period of time. Therefore, the Debtors cannot fund the proposed Chapter 13 Plan of Reorganization even had it been proposed in good faith.

XXI.

Movants would further show the Court that Debtors have intentionally and fraudulently omitted, from their lists of liabilities, debts and obligations owed to NCNB for a student loan and to the Texas Attorney General's Office for child support. This constitutes further evidence of Debtors' bad faith.

XXII.

Continuation of the automatic stay of 11 U.S.C. § 362 will work real and irreparable harm to Movants and will deprive Movants of the adequate protection to which it is entitled under 11 U.S.C. § 362 and 11 U.S.C. § 363.

XXIII.

Movants are able to show that they are entitled to termination of the automatic stay for the following reasons:

a) Neither Debtors nor their Estate have an interest in such property [11 U.S.C. 541];

b) Cause exists under 11 U.S.C. 362(d) (1) in that neither the Debtors nor the estate have an interest in the property and the occupation by the Debtors of same is n unlawful detention of Movants' property; and

c) Debtors have not complied with 11 U.S.C. 1322(b)(2) and 1322(b)(5).

XXIV.

Movants additionally request attorney's fees as provided under the terms of the Note and Deed of Trust of Movants.

WHEREFORE, PREMISES CONSIDERED, Movants pray that the automatic stay under 11 U.S.C. 362 be vacated so as to permit ALFRED S. GARCIA and ROSIE A. GARCIA, or their successors and assigns, to commence an action for forcible entry and detainer against Debtors, for all attorney's fees and costs incurred, and for such other and further relief as the Court may deem proper.

DATED July 21, 1994.

Respectfully submitted,

THOMAS J. SIBLEY, P.C.
P. O. Box 3945
Beaumont, Texas 77704-3945
Telephone No. (409) 835-9944
Telefax No. (409) 838-4741

/S/Thomas J. Sibley
State Bar No. 18338000

ATTORNEY FOR MOVANTS

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion to Lift Stay was served by First Class U.S. Mail to Leroy Jones and Paula Faye Jones, at 5575 Bonnie Lee, Beaumont, Texas 77705, to Frank J. Maida, at P. O. Box 5308, Beaumont, Texas 77726-5308, and to Michael Gross, Chapter Thirteen Trustee, at P. O. Box 7190, Tyler, Texas 75711 on July 21, 1994.

/S/Thomas J. Sibley

APPENDIX F

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

IN RE:

LEROY JONES and PAULA FAYE JONES,	CAUSE NO. 94-10423S (CHAPTER 13)

DEBTOR(S)

OBJECTION TO ALFRED S. GARCIA AND ROSIE A. GARCIA'S MOTION FOR RELIEF FROM AUTOMATIC STAY

TO THE HONORABLE DONALD R. SHARP, U. S. BANKRUPTCY JUDGE:

COMES NOW, Frank J. Maida & Associates, P.C., attorneys for LEROY JONES and PAULA FAYE JONES, debtors, and hereby object to the Motion for Relief From Automatic Stay, filed herein by ALFRED S. GARCIA and ROSIE A. GARCIA, upon the following grounds:

1. The Debtors filed their bankruptcy petition in good faith;
2. The Debtors duly filed an amended creditor matrix to reflect the creditors' correct address;
3. The Debtors have duly scheduled this creditor as a secured debt to be paid in full under their plan or reorganization, including 12% interest.

WHEREFORE, Debtors pray that a hearing be held on Movant's Motion.

DATED: July 22, 1994

Respectfully submitted,

FRANK J. MAIDA & ASSOCIATES, P.C.

/S/Frank J. Maida
P. O. Box 5308
Beaumont, Texas 77726-5308
(409) 898-8200
Fax No. (409) 898-8400
State Bar No. 12845600

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Objection has been properly forwarded to all interested parties on this the 25th day of July, 1994.

/S/Frank J. Maida

Mr. and Mrs. Alfred Garcia
c/o Thomas J. Sibley, P.C.
Attorney at Law
P. O. Box 3708
Beaumont, Texas 77704-3708

Mr. Michael Gross
U. S. Chapter Thirteen Trustee
Eastern District of Texas
P. O. Box 7190
Tyler, Texas 75711

APPENDIX G

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

IN RE:

LEROY JONES and	CAUSE NO. 94-10423
PAULA FAYE JONES,	CHAPTER 13)

Debtors.

ORDER

The Motion of Alfred S. and Rosie A. Garcia for Relief from Automatic Stay came before the Court for consideration pursuant to regular setting, and the Court considered the pleadings, the stipulations or counsel, the evidence adduced, the arguments and written briefs of counsel and for reasons contained in a written opinion dated contemporaneously herewith,

It is ORDERED, ADJUDGED and DECREED that the automatic stay provided by 11 U.S.C. 362(a) is hereby modified as to the following property:

> Lot Nineteen (19) in Block Two (2) of SOUTH PARK THIRD ADDITION to the City of Beaumont, Jefferson County, Texas, according to the map or plat of record in Volume 8, Page 166, Map Records in the office of the County Clerk of said County and State.

Said stay is modified to allow Alfred S. and Rosie A. Garcia to proceed with a forcible entry and detainer action and such other actions as may be necessary to regain possession of the property described above.

SIGNED this 28th day of September, 1994.

/S/ DONALD R. SHARP
UNITED STATES BANKRUPTCY JUDGE

Supreme Court, U.S.
FILED
MAR 27 1996
CLERK

No. 95-1357

In The

Supreme Court of the United States

October Term, 1995

LEROY JONES and PAULA FAY JONES,

Petitioners,

vs.

ALFRED GARCIA and ROSE A. GARCIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS J. SIBLEY
Counsel of Record
THOMAS J. SIBLEY, P.C.
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8581
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Whether the post-petition foreclosure sale is voidable rather than void *ab initio*, and fits the statutory exception for good faith purchasers provided in 11 U.S.C.§ 549(c).

PARTIES TO THE PROCEEDINGS

Petitioners Leroy and Paula Faye Jones are Chapter 13 Debtors in bankruptcy. Respondents Alfred and Rose A. Garcia are owners of the property who foreclosed on the Petitioners' residence.

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Respondents, Leroy Jones and Paula Fay Jones, respectfully request that this Court deny the petition for Writ of Certiorari which seeks review of the Fifth Circuit's opinion below, which is reported at 63 F.3d 411 (5th Cir. 1995), and which is reprinted in the petition for certiorari at Appendix B.

ADDITIONAL STATUTE INVOLVED

11 U.S.C. § 542(c):

> Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

STATEMENT OF THE CASE

A. Procedural History

Petitioners filed their current Chapter 13 bankruptcy on May 23, 1994. Having received no notice of the Petitioners' current bankruptcy filing, Respondents held a foreclosure sale on June 7, 1994. Respondents filed their Motion for Relief from Automatic Stay on July 21, 1994. The hearing on said Motion was held in the United States Bankruptcy Court for the Eastern District of Texas, Beaumont Division, on September 14, 1994. The Bankruptcy Court issued its opinion and order granting the Respondents relief from the automatic stay on October 4, 1994.

The Petitioners filed their notice of appeal to the United States District Court for the Eastern District of Texas, Beaumont Division, on October 6, 1994. On October 13, 1994, Petitioners filed their emergency motion for stay of order pending appeal. The Bankruptcy Court entered its order denying emergency motion for stay of order pending appeal on October 14, 1994. The District Court entered its judgment affirming the Bankruptcy Court on February 3, 1995. Petitioners subsequently appealed the District Court's decision to the United States Court of Appeals for the Fifth Circuit. On September 11, 1995, the United States Court of Appeals for the Fifth Circuit issued its opinion affirming the judgment of the United States District Court for Eastern District of Texas, Beaumont Division. On October 25, 1995, the Fifth Circuit of Appeals entered its order denying Petitioners' Motion for Rehearing, and Petitioners then filed a Petition for Writ of Certiorari in this Court on January 23, 1996.

B. Facts

The Petitioners bought the property at issue from the Respondents in March 1989. The Petitioners first defaulted on their obligation to Respondents in 1991, and foreclosure proceedings were then begun. The Petitioners filed their first Chapter 13 petition on June 20, 1991, as Cause Number 91-10690-S to stay Respondents' foreclosure proceeding. Said plan provided that the Respondents be paid outside the plan.

The Petitioners again defaulted, under the above confirmed plan, in March of 1994, and foreclosure proceedings were again commenced. The Petitioners filed a motion to dismiss their confirmed Chapter 13 plan on May 5th, 1994. Said motion to dismiss was served on Respondents' counsel, Thomas J. Sibley, by Petitioners' counsel Frank J. Maida.

On May 16, 1994, Respondents accelerated the debt. Petitioners' second Chapter 13 petition was filed on May 23, 1994. Although Respondents' counsel had received notice of Petitioners' motion to dismiss Chapter 13 case and had mailed numerous default and foreclosure notices to Petitioners, no notice of the refiling of Petitioners' Chapter 13 bankruptcy was provided to Respondents' counsel by Frank Maida. Additionally, no notice of Petitioners' refiling of their Chapter 13 bankruptcy proceeding was provided to Respondents, notwithstanding that the Respondents' proper address was evidenced on all of the loan documents and that Petitioners had been making payments to Respondents' true and proper address for years. Furthermore, Petitioners failed to file a notice of their second bankruptcy proceeding in the real property records of Jefferson County as required by § 549(c) of the Bankruptcy Code.

Having received no notice of the Petitioners' second bankruptcy filing, Respondents held a properly noticed foreclosure sale on June 7, 1994, and the property was sold to Respondents by properly filed trustee's deed for $28,000.00.

Respondents filed a motion for relief from automatic stay on July 21, 1994, to commence an action for forcible entry and detainer against the Petitioners, based on the grounds that the foreclosure was valid and that Respondents held valid title to the subject property.

After hearing on September 14, 1994, the Bankruptcy Court issued its opinion and order on October 4, 1994, granting the Respondents relief from the automatic stay to allow Respondents to proceed with a forcible and entry detainer action.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT CORRECTLY HELD THAT THE POST-PETITION FORECLOSURE SALE WAS VOIDABLE RATHER THAN VOID *AB INITIO*, THEREBY ALLOWING VALIDATION OF THE TRANSACTION UNDER 11 U.S.C. § 549(c).

Petitioners' argument that the "majority of circuits" which have considered the issue have found post-petition transactions to be void *ab initio* overlooks the fact that, even those courts which have held that acts in violation of the automatic stay under 11 U.S.C. § 362 are void *ab initio* have reached the same result as those courts which have held that such acts are merely voidable because those courts have allowed retroactive relief on statutory or equitable grounds, thereby validating the post-petition transaction. In fact, it is illustrative that *none* of the cases cited by Petitioners which found post-petition transactions to be void *ab initio*[1] without validating the post-petition transaction dealt with the statutory exceptions which are at issue in this case, *i.e.*, 11 U.S.C. §§ 549(c) and 542(c). Furthermore, many of the cases

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1. *In re Rose*, 113 B.R. 534 (W.D. Mo. 1990); *Matthews v. Rosene*, 739 F.2d 249 (1984); *In re Rhodes*, 147 B.R. 492 (Bkrtcy W.D. Ark. 1992); *In re Stacy*, 21 B.R. 49 (Bkrtcy. W.D. Va. 1982); *Thomas v. Miller*, 906 S.W.2d 260 (Tex. App.- Texarkana 1995); *In re Garcia*, 109 B.R. 335 (N.D. Ill. 1989); *In re National Cattle Congress*, 179 B.R. 588 (Bkrtcy N.D. Iowa 1995); *In re Omni Graphics*, 119 B.R. 641 (Bkrtcy E.D. Wis. 1990); *Parker v. Bain*, 68 F.3d 1131 (9th Cir. 1995); *Kalb v. Feuerstein*, 308 U.S. 433 (1940); *In re Estate of Barefoot*, 43 B.R. 608 (Bkrtcy E.D. N.C. 1984); *In re Clarkson*, 168 B.R. 93 (Bkrtcy D.S.C. 1994); *In re Burns*, 112 B.R. 763 (Bkrtcy.E.D. Va. 1990); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306(1982); *Matter of Holland*, 21 B.R. 681 (Bkrtcy N.D. Ind. 1983); *In re Claussen*, 118 B.R. 1009 (Bkrtcy D.S.D. 1990); *Matter of Garofalo's Finer Foods, Inc.*, 186 B.R. 414 (N.D. Ill. 1995); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522 (2d Cir. 1984).

cited by Petitioners which found post-petition transactions to be void *ab initio* nevertheless found that retroactive relief was appropriate under 11 U.S.C. § 549(c), or some other exception, thereby validating the post-petition transaction.[2]

As stated above, when the opinions cited by Petitioners are reviewed mindful of the result reached rather than the semantics used, it is clear that Petitioners have not presented a sufficient conflict among the Circuit Courts or an issue of sufficient importance to warrant review by this Court.

The United States Bankruptcy Court for the District of Nebraska well-characterized the specious nature of the issue presented herein by Petitioners in *Matter of Germer,* 107 B.R. 217 (Bkrtcy. D. Neb. 1989). In that case, the court noted that "there is a *superficial* split of authority as to whether an act in violation of the stay is void or voidable." *Id.* at 219 [emphasis added]. The court stated that some courts have held that the acts in violation of the stay were voidable, while other courts had held that acts violating the stay were void, and noted that "the differences in these lines of decisions are largely semantic." *Id.* at 220.

Those courts which have held that acts in violation of the stay are void *ab initio* expressly state that the rule is a "general rule," and many of said courts have expressed willingness to treat post-petition transactions as voidable for numerous reasons. As in the case presently before this Court, the court in *Matter of Germer, supra,* was faced with the issue of the

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2. *See Constitution Bank v. Tubbs,* 68 F.3d 685 (3rd Cir. 1995); *Franklin Savings Assoc. v. Office of Thrift Supervision,* 31 F.3d 1020 (10th Cir. 1994); *In re Lampkin,* 116 B. R. 450 (Bkrtcy D. Md. 1990), *In re Rothenberg,* 173 B.R. 4 (Bkrtcy D.D.C. 1994); *In re Schwartz,* 954 F.2d 569 (9th Cir. 1992); *In re Servico, Inc.,* 144 B. R. 933 (Bkrtcy S. D. Fla. 1992); *In re Smith Corset Shops,* 696 F.2d 971 (1st Cir. 1982).

application of § 549(c) and § 542 (c) of the Bankruptcy Code, and the Court concluded that the sale of property in violation of the stay was voidable, noting that the

> statutory scheme permits a transfer in violation of the stay to vest valid title in certain transferees. This result is inconsistent with the notion that an act in violation of the stay is void. Since valid title passes to transferees under these exceptions, it follows that the act taken in violation of the stay is voidable rather than void. This analysis is consistent with common law rules concerning distinctions between void and voidable title. When Congress intends an act in violation of a stay under the Bankruptcy Code to be void, it has no difficulty in explicitly so providing, as it has done under 11 U.S.C. § 524(a) which voids judgments on discharged debts.

Id. at 220.

Furthermore, Petitioners' characterization of the Fifth Circuit as relatively isolated with respect to its holdings regarding this issue is incorrect. For example, Petitioners characterize the Third Circuit as subscribing to the void *ab initio* school of jurisprudence, citing *Constitution Bank v. Tubbs*, 68 F.3d 685 (3rd Cir. 1995), at 692. However, before the *Constitution Bank* decision, the Third Circuit had previously considered the same issue and reached the opposite result. The Third Circuit concluded in *In re Siciliano*, 13 F.3d 748 (3d Cir. 1994), that

> after careful consideration of the relevant

> statutory provisions of the Bankruptcy Code, we find that the Bankruptcy Court erred when it dismissed [the] motion on the basis that the foreclosure sale was void, not merely voidable. While the Court correctly articulated the general principle that any creditor action taken in violation of an automatic stay is void ab initio, [citation omitted], we find that the instant case falls within an exception to that rule.

Id. at 750. The Third Circuit further stated:

> [W]e agree with [the] contention that the inclusion of the word "unknowing" in [11 U.S.C. 362 (d)], indicates a legislative intent to apply certain types of relief retroactively and validate proceedings that would otherwise be void *ab initio.*

Id. at 751. The court noted that the Fifth Circuit has acknowledged that the power to annul authorizes the court to validate actions taken subsequent to the impressing of the § 362(a) stay, citing *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989), at 178. *Id.* Therefore, contrary to Petitioners' assertions otherwise, the Third Circuit Court of Appeals has not uniformly espoused the notion that post-petition transfers are void. Indeed, the Third Circuit cited its prior opinion in *In re Siciliano* in *Constitution Bank*, and did not overrule that decision. The Third Circuit's decisions in *In re Siciliano* and *Constitution Bank* are an excellent example of the fact that, although the Circuit Courts use various semantics, they reach the same result.

In addition, despite Petitioners' inaccurate statement to the

contrary, the Sixth Circuit has not embraced the "void *ab initio*" theory. Indeed, in *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905 (6th Cir. 1993), erroneously cited by Petitioners as subscribing to the "void *ab initio*" theory, the Sixth Circuit Court of Appeals adopted the "voidable" school of thought. The court began its discussion of the issue by referencing the definitions of "void" and "voidable." As explained by the court,

> "[v]oid" is defined as "an instrument or transaction [that] is nugatory and ineffective so that nothing can cure it, Black's Law Dictionary 1573 (6th ed. 1990); and as that "of no legal force or effect and so incapable of confirmation or ratification." Webster's Third New International Dictionary 2562 (1971). "Voidable" is defined as "not void in itself," Black's Law Dictionary 1574 (6th ed. 1990), and as "capable of being adjudged void, invalid, and of no force," Webster's Third New International Dictionary 2562 (1971) . . . . [I]nvalid is a more appropriate adjective to use when defining an action taken against a debtor during the duration of the automatic stay . . . . [S]omething that is invalid is not incurable, in contrast to a void action which is incapable of being ratified.

Id. at 909. The court held that, to give effect to the Bankruptcy Court's statutory authority to annul a stay, post-petition actions "can only be described as invalid and voidable, since void actions are incapable of later cure or validation." *Id.* at 910. The court expressly rejected the Ninth Circuit's reasoning in *In re Schwartz, supra,* as creating "a needless legal fiction." *Id.* Finally, the *Easley* court rejected the Ninth Circuit's view, which Petitioners would have this Court adopt, that, by holding post-

petition actions voidable instead of void, courts are imposing added or undue burdens on the debtor, stating that, regardless of whether acts in violation of the stay are void or voidable, "the debtor must respond in some fashion to the action." *Id.* Moreover, numerous other courts have subscribed to the "voidable" school of jurisprudence.[3]

As stated by the Fifth Circuit in *Sikes, supra,* "the better reasoned rule characterizes acts taken in violation of the automatic stay as voidable rather than void. . . . [T]he characterization of every violation of § 362 as being absolutely void is inaccurate and overly broad." *Id.* at 178, citing *In re Fuel Oil Supply & Terminal, Inc.*, 30 B.R. 360 (Bkrtcy. N. D. Tex. 1983), at 362. As noted by the *Sikes* court, the same conclusion was reached by the Eleventh Circuit in *In re Albany Partners, Ltd.*, 749 F.2d 670 (11th Cir. 1984). Therefore, Petitioners' characterization of the Eleventh Circuit as uniformly espousing the "void *ab initio*" theory, by citation to *Borg-Warner Acceptance Corp. v. Hall,* 685 F.2d 1306 (11th Cir. 1982), is simply incorrect.

In *Sikes,* the court found it instructive that the Bankruptcy

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3. *See, e.g., In re IBI Security Service, Inc.*, 158 B.R. 1 (Bkrtcy. E.D.N.Y. 1993), at 2; *In re Bresler,* 119 B.R. 400 (Bkrtcy. E.D.N.Y. 1990), at 403; *In re McGee,* 181 B.R. 307 (Bkrtcy. N.D. Ohio 1995), at 310, citing *Easley, supra; In re Huron,* 180 B.R. 496 (Bkrtcy. N.D. Ohio 1995), at 498, citing *Easley, supra; In re Brooks,* 79 B.R. 479 (9th Cir. B.A.P. 1987), at 480; *In re Clark,* 79 B.R. 723 (Bkrtcy. S.D. Ohio 1987), at 725; *In re Oliver,* 38 B.R. 245 (Bkrtcy. D. Minn. 1984), at 247-248; *In re Sports & Science, Ind., Inc.*, 95 B.R. 745 (Bkrtcy. C.D. Cal. 1989), at 747; *In re A. J. Bayless Markets, Inc.*, 108 B.R. 721 (Bkrtcy. D. Ariz. 1989), at 727; *In re Bernard,* 21 B.R. 287 (Bkrtcy. E.D. Pa. 1982), at 289; *In re McGowan,* 19 B.R. 952 (Bkrtcy. E.D. Pa. 1982), at 954; *In re Hill,* 156 B.R. 998 (Bkrtcy. E.D. Ill. 1993), at 1007; *In re Dale,* 152 B.R. 573 (Bkrtcy. D. Minn. 1993), at 579; *In re Billingsley,* 175 B.R. 286 (Bkrtcy. E.D. Ark. 1994), at 291.

Code specifically protects certain actions taken in violation of the automatic stay, noting that, under § 549, "some transactions made in violation of the stay will be deemed valid unless voided at the Trustee's discretion." *Id.* at 179. The court also noted that § 542(c) ratifies transfers by parties having no knowledge of the bankruptcy case. *Id.* As reasoned by the Fifth Circuit in *Sikes,* if everything done post-petition were void in the strict sense of the word, the statutory exceptions provided in §§ 549 and 542(c) would either be meaningless or inconsistent with the specific mandate of the automatic stay under § 362(a). The *Sikes* court cited *Collier on Bankruptcy* as a preeminent secondary authority, noting that Collier states:

> in addition to the obvious power to "terminate" the stay, [§362(d)] also gives the Bankruptcy Court the power to "annul" the stay. The difference between the two is that an order annulling the stay could operate retroactively to date of the filing of the petition which gave rise to the stay, and thus validate actions taken by party at a time when he may have been unaware of the existence of the stay. On the other hand, an order terminating the stay would be operative only from the date of its entry.

Id. at 179, citing 2 *Colliers' Bankruptcy Manual,* §362.06 (3d ed. 1983).

The Fifth Circuit, like the vast majority of the Circuit Courts of Appeals which have considered the issue, has held that Bankruptcy Courts have the authority to "annul" a stay retroactively, and such a result is properly available to claimants who are honestly ignorant of the Bankruptcy Stay. *In re Pinetree,*

Ltd., 876 F.2d 34 (5th Cir 1989), at 38.[4] A reasoned review of these opinions can only lead to the conclusion that, despite the imprecise semantics used by the Courts of Appeals, the Courts of Appeals do not disagree with respect to the results reached in cases such as the case at bar. Petitioners' attempt to obtain review by this Court by debating whether the word "void" or "voidable" should be used to describe post-petition transactions is misleading, specious, and without merit. Petitioners have not presented an irreconcilable or intolerable conflict among the Circuit Courts or an issue of sufficient importance for review by this Court, and the Court should decline Petitioners' invitation to disturb the Fifth Circuit's opinion.

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4. *Accord, see Algeran, Inc., v. Advance Ross Corp.*, 759 F.2d 1421 (9th Cir. 1985); *In re Bernard*, 21 B.R. 287 (Bkrtcy E. D. of Pa 1982); *Bronson v. United States*, 46 F.3d 1573 (Fed. Cir.); *Constitution Bk. v. Tubbs*, 68 F.3d 685 (3rd Cir. 1995); *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905 (6th Cir. 1993); *Franklin Savings Assoc. v. Office of Thrift Supervision*, 31 F.3d 1020 (10th Cir.1994); *In re Hill*, 156 B.R. 998 (Bkrtcy N.D. of Ill. 1993); *In re Lampkin*, 116 B.R. 450 (Bkrtcy D. of Md. 1990); *In re McGowan*, 19 B.R. 952 (Bkrtcy E.D. of Pa.1982); *Picco v. Global Marine Drilling Co.*, 900 F.2d 846 (5th Cir. 1990); *In re Rothenberg*, 173 B.R. 4 (Bkrtcy D.D.C. 1994); *In re Sapp*, 91 B.R. 520 (Bkrtcy E.D. of Mo. 1988); *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992); *In re Servico, Inc.*, 144 B.R. 933 (Bkrtcy S.D. of Fl. 1992); *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989); *In re Smith Corset Shops*, 696 F.2d 971 (1st Cir. 1982).

II.

THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED THE CASE LAW INTERPRETING 11 U.S.C. § 549(c), FINDING THAT RESPONDENTS WERE ENTITLED TO THE PROTECTION OF 11 U.S.C. § 549(c), AND THERE IS NOT SUFFICIENT CONFLICT AMONG THE CIRCUITS REGARDING THIS ISSUE TO JUSTIFY REVIEW BY THIS COURT.

Petitioners would have this Court adopt, by sweeping pronouncement, the view that a purchaser at his own foreclosure sale does not give "present fair equivalent value" as contemplated by 11 U.S.C.§ 549(c) on the ground that the Fifth Circuit chose to decide the issue under § 362(d)(2) rather than § 549(c). Petitioners assert, without any citation to controlling authority, that even if an otherwise void or voidable transaction is retroactively authorized by the court under § 362(d), the transaction must still pass the test of § 549(c) exactly as it would have been required to do had the automatic stay not been implicated in the case. Petitioners' argument that the Fifth Circuit created a false relationship between § 362 and § 549(c) is meritless, as a reasoned review of the Fifth Circuit's opinion by this Court will reveal. Like Petitioners' argument with respect to whether post-petition transactions should be declared "void" or "voidable", Petitioners' argument regarding § 549(c) is specious. The authorities cited by Respondents in their brief below, which hold that mortgagees may give "present fair equivalent value" are valid and controlling.[5]

As Petitioners state in their petition herein, statutes should be construed in harmony, rather than conflicting with each other,

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5. *In re Ward*, 837 F.2d 124 (3d Cir. 1988); *In re Bernard*, 21 B.R.287 (Bkrtcy. E.D. Pa. 1982); *In re McGowan*, 19 B.R. 952 (Bkrtcy. E.D. Pa. 1982).

so as to give meaning to each statute. *In re Hill,* 156 B.R. 998, 1007 (Bkrtcy N.D. of Ill. 1993). Petitioners would have this Court reject the Fifth Circuit's reasoning on the ground that, according to Petitioners, the court's reasoning does not give effect to both § 549(c) and § 362(d). However, despite Petitioners' assertions to the contrary, this Court is not required to accept Petitioners' argument in order to give effect to both § 549(c) and § 362(d). Contrary to Petitioners' statement concerning the Fifth Circuit's opinion, the Fifth Circuit Court of Appeals did not state that § 362(d)(2) and § 549(c) overlap. Rather, the court simply found that, because the transaction at issue in this case was retroactively authorized by the court under § 362(d), § 549(c) was not implicated because § 549(a) expressly exempts from the trustees' authority transactions which are authorized by the court.

Most significantly, Petitioners' argument overlooks this Court's recent opinion in *BFP v. Resolution Trust Corporation,* __U.S.__, 114 S. Ct. 1757, 128 L. Ed. 2d 556 (1994). Indeed, all of the authorities cited by Petitioners in support of their argument pre-date this Court's decision in *BFP v. Resolution Trust Corporation.* As the Court will recall, *BFP* involved an attempt to set aside a pre-petition mortgage foreclosure under 11 U.S.C. § 548, which provides that the trustee may avoid any transfer of an interest of the debtor in property that was made or incurred within one year before the date of filing the petition, if the debtor received less than a "reasonably equivalent value" in exchange for the transfer. This Court, per Justice Scalia, held that "a fair and proper price, or a 'reasonably equivalent value' for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with." *Id.,* 114 S. Ct. at 1765. It is undisputed that the foreclosure sale at issue in the case *sub judice* was non-collusive and was conducted in accordance with the requirements of Texas law.

In addition, the Court of Appeals for the Fifth Circuit in *T. F. Stone Company, Inc. v. Harper,* 72 F.3d 466 (5th Cir. 1995), recently had occasion to consider whether this Court's decision in *BFP v. Resolution Trust Corporation* applies to the determination of whether a purchaser fits the "present fair equivalent value" requirement of 11 U.S.C. § 549(c). Citation to this case is also conspicuously absent from Petitioners' Petition for Writ of Certiorari. In that case, the Fifth Circuit noted the opinions in *In re Purnell,* 92 B.R. 625 (Bkrtcy. E.D. Pa. 1988) and *In re Briglevich,* 147 B.R. 1015 (Bkrtcy. N.D. Ga. 1992), which are cited by Petitioners, and rejected same after analyzing this Court's opinion in *BFP,* noting that

> the BFP Court's analysis of § 548 expressly eschewed any consideration of the substantive value received in a forced-sale context and instead pinned the validity of the transfer on whether the forced sale was noncollusive and conducted in compliance with state law.

T. F. Stone Company, Inc. at 469. The court began its analysis with the text of both 11 U.S.C. § 548 and § 549. The court noted that § 548 requires "reasonably equivalent value," while § 549 demands "present fair equivalent value," and held that

> we are unable . . . to perceive a meaningful difference between "reasonably" and "present fair" as applied in the context of this forced-sale case. . . . [W]e think that, in a forced-sale context, a value that is "reasonably equivalent" is also "fair equivalent," and vice versa. Indeed, the BFP Court used the words "reasonably" and "fair" in tandem, in such a manner as to belie the notion that they have different meanings.

Id. at 470. The Fifth Circuit also noted this Court's holding in *BFP* that "reasonably equivalent value" "cannot be measured by reference to 'fair market value,' since Congress could have used the language of 'fair market value' had it intended such a benchmark." *Id.* In addition, the Fifth Circuit noted that reference to the fair market value of real property is especially inappropriate in the context of a forced sale, and that any effort to ascertain what constitutes a "reasonable" or "fair" forced-sale price "requires a policy judgment that courts ought not attempt." *Id.* at 470-471. Accordingly, the Fifth Circuit concluded that the logic of *BFP* "trumps the differences between the relevant language of § 548(a)(2)(A) and § 549(c) and [sic] the contexts of mortgage foreclosure sales and tax sales." *Id.* at 471. Finally, the court pointed out that the debtor had declined to avail itself of a "critical safeguard" under § 549 when it never informed the creditor of its bankruptcy. *Id.* Petitioners herein made the same mistake, and this Court should decline to overturn the Fifth Circuit's well-reasoned decision.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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